

This Opinion is not a  
Precedent of the TTAB

Mailed: December 5, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re MBA Media Group, LLC*  
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Serial No. 90746611  
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Rob L. Phillips, Esq., of FisherBroyles LLP,  
for MBA Media Group, LLC

Robert Clark, Trademark Examining Attorney, Law Office 101,  
Zachary Sparer, Managing Attorney.

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Before Goodman, Lynch, and Casagrande,  
Administrative Trademark Judges.

Opinion by Casagrande, Administrative Trademark Judge:

MBA Media Group, LLC (“Applicant”) seeks registration on the Principal Register of the mark NAME IMAGE LIKENESS VALUATION in standard characters for services ultimately described as “Promotional and marketing services; branding services, namely, consulting, development, management and marketing of brands for

public persons, including athletes and entertainers, based on name, image, likeness,” in International Class 35.<sup>1</sup>

The Trademark Examining Attorney refused registration of Applicant’s mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1).<sup>2</sup> After final refusal, Applicant appealed to this Board.<sup>3</sup> Applicant filed a brief,<sup>4</sup> as did the Examining Attorney,<sup>5</sup> and Applicant filed a reply.<sup>6</sup>

We now affirm the refusal to register.

## I. Legal background

Section 2(e)(1) of the Trademark Act excludes from registration any “mark which, (1) when used on or in connection with the goods [or services] of the applicant is merely descriptive ... of them.” 15 U.S.C. § 1052(e)(1).<sup>7</sup> “A term is merely descriptive

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<sup>1</sup> Application Serial No. 90746611 was filed on June 1, 2021, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

<sup>2</sup> See February 15, 2022, Nonfinal Office Action; September 13, 2022, Final Office Action. Page citations in this opinion to the application record, including the request for reconsideration and its denial, are to pages in the Trademark Status and Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”). Any specific page numbers cited will correspond to the .pdf-format downloaded version of such documents.

<sup>3</sup> See 1 TTABVUE. Citations in this opinion to filings in proceedings before the Board are to TTABVUE, the Board’s online docketing system. The number preceding TTABVUE corresponds to the docket entry number, and any number(s) following TTABVUE refer to the page(s) of the docket entry, as paginated by TTABVUE, where the cited portions of the document appear.

<sup>4</sup> See 4 TTABVUE.

<sup>5</sup> See 6 TTABVUE.

<sup>6</sup> See 7 TTABVUE.

<sup>7</sup> “Terms that are merely descriptive cannot be registered on the principal register unless they acquire distinctiveness ... under 15 U.S.C. § 1052(f).” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1373 (Fed. Cir. 2018) (cleaned up; citations

if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (citations omitted). In contrast, a mark is suggestive if the evidence shows that “imagination, thought and perception” are required to arrive at the feature(s), quality(ies), or characteristic(s) in question. *See, e.g., In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017); *Earnhardt v. Kerry Earnhardt, Inc.*, 864 F.3d 1374, 123 USPQ2d 1411, 1413 (Fed. Cir. 2017).

“A mark need not recite each feature of the relevant goods or services in detail to be descriptive, it need only describe a single feature or attribute.” *Chamber of Commerce*, 102 USPQ2d at 1219 (citation and internal quotation omitted). “[T]he question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods and services are will understand the mark to convey information about them.” *Earnhardt*, 123 USPQ2d at 1413 (cleaned up; citations omitted).

“The major reasons for not protecting [merely descriptive] marks are: (1) to prevent the owner of a mark from inhibiting competition in the sale of particular goods [or services]; and (2) to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the

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omitted). Applicant has not claimed that its mark has acquired distinctiveness, which is not surprising given that this is an application under Section 1(b) and Applicant has not filed an amendment to allege use. *See, e.g., In re Olin Corp.*, 124 USPQ2d 1327, 1333 (TTAB 2017) (“A claim of distinctiveness under Section 2(f) normally is not raised in a Section 1(b) application before the applicant files an amendment to allege use or a statement of use because a claim of acquired distinctiveness, by definition, requires prior use.”).

registrant against others who use the mark when advertising or describing their own products [or services].” *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978) (citation omitted).

Refusals for mere descriptiveness, like other refusals, are based on evidence bearing on public perception of the mark. *See, e.g., Real Foods*, 128 USPQ2d at 1374 (descriptiveness inquiry “consider[s] the commercial impression of a mark as a whole, viewed through the eyes of a consumer”) (cleaned up, citation omitted). “Evidence of the public’s understanding of the term may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers[,] and other publications.” *Id.* (citation omitted).

Because the issue of whether a proposed mark is merely descriptive requires an assessment of how the public will perceive the proposed mark in connection with the goods or services an applicant offers under the mark, we note initially that Applicant’s current amended identification of services is different from in the recitation in its initial application. The application identified the services under the mark as “Providing promotional, marketing and brand-building services for public persons, including athletes and entertainers, based on name, image, likenesses; and developing name, likeness and image valuations associated with public persons.”<sup>8</sup> In the February 15, 2022, Nonfinal Office Action, the Examining Attorney required Applicant to amend this description because it was indefinite. The Examining Attorney suggested that Applicant could adopt the following wording, if accurate:

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<sup>8</sup> June 1, 2021 Application.

“Promotional and marketing services; branding services, namely, consulting, development, management and marketing of brands for for [sic] public persons, including athletes and entertainers, based on name, image, likenesses.”<sup>9</sup> Applicant obliged, amending the services identification to “Promotional and marketing services; branding services, namely, consulting, development, management and marketing of brands for public persons, including athletes and entertainers, based on name, image, likeness.”<sup>10</sup>

## II. Evidence and analysis

The evidence of record consists of three pieces of evidence placed in the record by the Examining Attorney:

- A Merriam-Webster Dictionary definition (online version) of “valuation” as “the act or process of valuing” and “the estimated or determined market value of a thing”;<sup>11</sup>
- An article on the website of “Appraisal Economic, Independent Valuation Experts,” entitled “Name, Image and Likeness,” which explains that “name, image and likeness” (abbreviated as “NIL”) “are the three separate components that form essential rights of publicity” discussing issues relating to the valuation of a public figure’s NIL. This article discusses the “market approach” and the “income approach” as means to determine “[t]he value of a celebrity’s NIL”;<sup>12</sup>
- An article in *Sports Business Journal* entitled “The market value of name, image and likeness? Reputation,” which discusses, inter alia, that “NIL market value plummets if [the person’s] reputation tarnishes” and that breaches of NIL-related contracts creates unreliability that could “lower [the person’s] NIL market value,” concluding that colleges and universities

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<sup>9</sup> Feb. 15, 2022, Nonfinal Office Action.

<sup>10</sup> Aug. 15, 2022 Response to Nonfinal Office Action.

<sup>11</sup> Feb. 15, 2022, Nonfinal Office Action, at TSDR 4.

<sup>12</sup> Sept. 13, 2022, Final Office Action, at TSDR 12-13.

who student athletes are entering into NIL deals must be cognizant that the “athletes’ NIL market value [is] their reputation.”<sup>13</sup>

Applicant did not offer any countering evidence during prosecution and did not move for reconsideration.<sup>14</sup>

There is no dispute that the component NAME IMAGE LIKENESS is merely descriptive of Applicant’s services, which Applicant’s services identification makes clear are “based on name, image, likeness.”<sup>15</sup> The appearance of a term in the recitation of services may be probative of the fact that the term is descriptive. *See In*

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<sup>13</sup> *Id.* at TSDR 4-8.

<sup>14</sup> While Applicant did not submit any evidence during prosecution, it attached a Merriam-Webster Dictionary (online version) of “evaluation” to its appeal brief. *See* 4 TTABVUE 6. The dictionary defines the word to mean “the act or result of evaluating” or “determination of the value, nature, character, or quality of something or someone.” The Examining Attorney objected on the basis of Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), which provides that “[t]he record should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.” 6 TTABVUE 6. We will take judicial notice of the definition in this instance. But it’s virtually identical to the definition of “valuation” and thus does not add anything useful to resolving this appeal.

The Examining Attorney similarly objected to a second exhibit Applicant attached to its brief (4 TTABVUE 8-10), comprising search results on the Google.com search engine for the term “automobile valuation.” We sustain the Examining Attorney’s objection to this late-filed evidence. The proper mechanism for requesting to place additional evidence in the record of a filed appeal is to request suspension of the appeal and a remand for further examination. Applicant did not make such a request. *See, e.g., In re Jimmy Moore LLC*, 119 USPQ2d 1764, 1767 (TTAB 2016) (“nothing prevented Applicant from filing a request for remand in order to introduce the evidence”). In any event, we fail to understand how this helps Applicant. *See, e.g., In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2003) (deeming Google® search results that provided very little context of the use of ASPIRINA to be “of little value in assessing the consumer public perception of the ASPIRINA mark”); *In re Tea & Sympathy, Inc.*, 88 USPQ2d 1062, 1064 n.3 (TTAB 2008) (finding truncated Google® search results entitled to little weight without additional evidence of how the searched term is used).

<sup>15</sup> The application also identifies “Promotional and marketing services” as a separate service, but we need not assess whether the proposed mark is merely descriptive of that seemingly broader service because a descriptiveness refusal of all services in a class is proper where the proposed mark is merely descriptive term of even one of the services in the class at issue. *See, e.g., Chamber of Commerce*, 102 USPQ2d at 1219; *In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005).

*re Taylor & Francis [Publishers] Inc.*, 55 USPQ2d 1213, 1215 (TTAB 2000) (use of the word “psychology” in the identification of goods demonstrated that the word was merely descriptive). And we find it probative of the descriptiveness of the component NAME IMAGE LIKENESS here. While we must ultimately assess the mark as a whole, there’s nothing wrong with assessing components of marks for descriptiveness in aid of assessing the mark as a whole. *See, e.g., Real Foods*, 128 USPQ2d at 1374; *Earnhardt*, 123 USPQ2d at 1414.

Moving to the component term VALUATION, Applicant does not argue that adding VALUATION to NAME IMAGE LIKENESS changes consumer perception as to the meaning of the whole. Rather, it first argues that its services do not provide make any “determination” of the value of clients’ NIL, “but rather are associated with increasing such a value.”<sup>16</sup> But, as the Examining Attorney notes,<sup>17</sup> increasing the value of something is “interconnected” with determining the value of that thing: one cannot tell whether the value has increased without knowing its starting value. Moreover, the evidence of record shows that determining the value of a client’s NIL is inextricably intertwined with “branding services, namely, consulting, development, management and marketing of brands for public persons, including athletes and entertainers” based on NIL. This is demonstrated by the two articles that discuss means of valuing NIL<sup>18</sup> and what kinds of things can negatively impact the value of

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<sup>16</sup> *See* Applicant’s Br., 4 TTABVUE 3; Applicant’s Reply, 7 TTABVUE 3. We note that Applicant accepts that “[v]aluation is a determination of the value, nature, character, or quality of something or someone.” Applicant’s Brief, 4 TTABVUE 3.

<sup>17</sup> *See* Examining Attorney Br., 6 TTABVUE 6.

<sup>18</sup> *See Sports Business Journal* article, Sept. 13, 2022, Final Office Action, at TSDR 4-8.

a celebrity's or athlete's NIL (i.e., the value of their reputation or publicity rights).<sup>19</sup> In addition, the identification of services in the application is broader than Applicant's argument implies. The application identifies "branding services, namely, consulting, development, management, and marketing of brands for public persons, including athletes and entertainers, based on name, image, likeness." Development of and consulting on NIL deals—i.e., negotiating compensation for clients' NIL—necessarily requires valuation.<sup>20</sup>

Applicant's second argument is that NAME IMAGE LIKENESS VALUATION is not descriptive of its services because it only "suggests the desired result of the services not the service itself [sic]."<sup>21</sup> Applicant cites *In re Noble Co.*, 225 USPQ 749 (TTAB 1985), comparing the holding in that case to the situation here. *Noble Co.* concerned the mark NOBURST "for nontoxic liquid antifreeze and rust inhibitor for use in hot water heating systems." *Id.* at 749-50. The examining attorney in that case argued that the term "was merely descriptive as applied to applicant's goods insofar as it indicates that when used in the manner prescribed it would prevent bursting of the pipes of the water system in which it is used." *Id.* at 750. We reversed because we found that it would require "interpretation by the viewer" of the mark to understand that the antifreeze product at issue, by preventing a hot water heating systems from

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<sup>19</sup> See the article on the website of "Appraisal Economic, Independent Valuation Experts." *Id.* at TSDR 12-13

<sup>20</sup> We find it significant as well that, as part of its initial identification of its services, Applicant specified that it intended to use the mark for "developing name, likeness and image valuations," deleting it only because the Examining Attorney found the initial identification indefinite as a whole. See *Taylor & Francis*, 55 USPQ2d at 1215.

<sup>21</sup> See 4 TTABVUE 4, 7 TTABVUE 3.

freezing, thereby in turn “reduces the likelihood that pipes of a water system in which it is used will burst as a result of adverse conditions.” *Id.*

Here, by contrast, we see nothing in the record indicating that any sort of thought, imagination, or perception is required, *see, e.g., N.C. Lottery*, 123 USPQ2d at 1709; *Earnhardt*, 123 USPQ2d at 1413, to understand that NAME IMAGE LIKENESS VALUATION describes an aspect of “consulting, development, management and marketing of brands for public persons, including athletes and entertainers, based on name, image, likeness” because such services inherently deal with valuing NIL rights, preventing decreases in such value and, hopefully, maximizing their value. And, as mentioned, Applicant concedes that its services are, in fact, focused on increasing the value of clients’ NIL rights.

Last, Applicant invokes the default rule that, where the Board has doubts whether the record shows that a proposed mark is merely descriptive, it passes the application to publication to see if anyone opposes it on the basis.<sup>22</sup> This rule, however, applies only where we have such doubt, *see, e.g., In re MBNA Am. Bank, N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1783 (Fed. Cir. 2003), and, here, on this record, we do not.

**Decision:** The refusal to register NAME IMAGE LIKENESS VALUATION for the identified services is affirmed.

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<sup>22</sup> *See* 4 TTABVUE 3; 7 TTABVUE 3.